

REMARKS

This communication responds to the *Office Action* dated December 24, 2009. Claims 1, 5, and 9 are amended. Support for the claim amendments may be found in at least paragraph [0022] of Applicants' *Published Application*.¹ No new claims are added. Claim 15 was previously canceled and no further claims are presently canceled. As a result, claims 1-14 remaining pending in this application.

Interview Summary

Applicant thanks Examiner Hoang Vu Nguyen Ba for the courtesy of a telephone interview on February 1, 2010 with Applicant's representative Susan Yee, in which it was discussed whether proposed clarification to the meaning of the limitation "retransmit rate" in the claim would distinguish the claim over the art of record. No agreement was reached.

§ 103 Rejection of the Claims

Claims 1-14 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,572,442 to Schulhof et al. (*Schulhof*) in view of U.S. Patent No. 5,956,716 to Kenner et al. (*Kenner*) and further in view of U.S. Patent No. 5,566,175 to *Davis*. Office Action at 5. The Examiner acknowledged in the Response to Arguments that *Redmond* (U.S. Patent No. 7,301,944) should be considered instead of *Davis*. Since a *prima facie* case of obviousness has not been properly established, Applicants respectfully traverse the rejection.

The U.S. Supreme Court decision of *KSR v. Teleflex* provides a tripartite test to evaluate obviousness.

The rationale to support a conclusion that a claim would have been obvious is that *all the claimed elements were known in the prior art* and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions, and the combination would have yielded nothing more than predictable results to one of ordinary skill in the art. (*See KSR International Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 U.S.P.Q.2d 1385 (2007)), *see also* MPEP § 2143. Emphasis added.)

¹ U.S. Published Patent Application No. 2002/0108117.

Applicants will show that the cited references, either singly or in combination, neither teach nor suggest all claimed elements of Applicants' claims.

Claim 1 recites, in part,

creating a request count for each content item of said plurality of content items based on said requests received;

sorting said requests using said request count;
determining an associated retransmit rate for each of said content items, said content items with a higher request count receiving a higher associated retransmit rate than content items with a lower request count, **the retransmit rate indicating how often said content items should be retransmitted;** and

repeatedly broadcasting the content items at said associated retransmit rate.²

Each of the other independent claims, claims 5 and 9, contain at least similar limitations as recited by claim 1.

In rejecting claim 1, the Examiner contended that the elements "content items with a higher request count" and "content items with a lower request count" are disclosed in *Kenner* citing to *Kenner* at col. 9, lines 55-64. *Office Action* at 6. Applicants assert that, in the present case, the Examiner has separated out content items with higher and lower request counts from an element of claim 1, and merely pointed to a reference that discusses video clips with higher usage than a least used locally stored clip. Clearly, the Examiner is evaluating elements in isolation and not considering the claim as a whole.

As further proof, the Examiner found the combination of *Schulhof* and *Kenner* did "not explicitly disclose *determining an associated retransmit rate for each of said content items*, [that the content items with a higher request count] *receiving a higher associated retransmission rate and repeatedly broadcasting the content items at said associated retransmit rate*," but found *Redmond* disclosed this limitation. *Office Action* at 6 (emphasis in original). As is clearly evident by the brackets removing the limitation "that the content items with a higher request count" (see *Office Action* at 3), the Examiner is evaluating this claim limitation in isolation.

² Emphasis added.

Further, by removing a portion of the claimed element, the Examiner has failed to consider all elements of the claim.

In the Response to Arguments, the Examiner responded to Applicants' assertion by stating that "the prior art references . . . are either in the field of applicant's endeavor or reasonably pertinent to the particular problem . . . [thus] any one of the references can be reasonably adapted to be used in the other two references in order to improve the distribution and management of media content process." *Office Action* at 3-4. However, Applicants note that the Examiner used three references in the rejection of independent claim 1. The number of references is highly suggestive that the Examiner is using Applicants' structure as a template and selecting individual elements from each reference in a hindsight reconstruction of Applicants' claimed invention. Further, the use of individual elements from the references suggests that the Examiner is merely considering whether the differences are obvious, not whether the invention as a whole is obvious.

The U.S. Supreme Court has held that USPTO personnel may not dissect a claimed invention into discrete elements and then evaluate the elements in isolation. Instead, the claim as a whole must be considered.³ In determining the differences between the prior art and the claims, the question under 35 U.S.C. §103 is *not whether the differences themselves* would have been obvious, but *whether the claimed invention as a whole would have been obvious*.⁴ When considered as a whole, Applicant's claimed elements are neither taught nor suggested by any combination of the cited references.

Further with respect to *Redmond*, the Examiner stated that "Redmond discloses a server/client media file distribution system wherein a media file server is adapted to monitor incoming user request messages and determine an overall throughput value based on the current user's transmission speed which can be automatically adjusted and used to optimally transmit a given media file." *Office Action* at 6. In the Response to Arguments, the Examiner further maintained that "Redmond's retransmit speed which is faster would have a direct consequence on the frequency of retransmission because the content is delivered much faster such that in the

³ See, e.g., *Diamond v. Diehr*, 450 U.S. 175, 188-89, 209 USPQ 1, 9 (1981).

⁴ *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 218 USPQ 871 (Fed. Cir. 1983); *Schenck v. Nortron Corp.*, 713 F.2d 782, 218 USPQ 698 (Fed. Cir. 1983).

end the content is delivered more times than if it is to be delivered with the normal speed.” *Office Action* at 4.

The cited portion of *Redmond* is directed to a “traffic director [which] monitors the transmission protocol and transmission speed of each client, and uses this information to optimally transmit a given media file to one or more clients.” *Redmond* at col.5, lines 32-35. Specifically,

[T]he media file servers . . . will monitor network performance during the transmission of the media file, **adapting the transmission speed to optimally accommodate the transmission speed** of all users currently viewing the media file. Thus, the transmission speed of the server can be **automatically adjusted based on the average throughput speed** of the users currently in communication with the server.⁵

The cited portion of *Redmond* discloses a transmission speed that is adjusted based on the average throughput speed. *Redmond*’s retransmit speed is not necessarily faster than what is considered the normal speed, only adjusted or adapted to accommodate transmission speeds of the users. While the retransmit speed of *Redmond* may have a direct consequence on the frequency of retransmission, it is not necessarily transmitting faster or more times. Thus, Applicants assert that the Examiner’s argument is flawed.

Furthermore, contrary to the Examiner’s statement, the speed of transmission in *Redmond* does not disclose “the retransmit rate indicating how often said content items should be retransmitted.” While *Redmond* may, in some instance, transmit at a faster speed and can thus retransmit more times than normal speed, this in no way **indicates how often the content item should be retransmitted**. It only indicates that the content item may be retransmitted more quickly.

Since Applicants have shown that not all the claimed elements were known as required by *KSR*, either by *Schulhof* singly or in any combination with *Kenner* and *Redmond*, Applicants respectfully request the Examiner withdraw the rejection under 35 U.S.C. §103 with regard to independent claims 1, 5, and 9.

⁵ *Redmond* at col. 5, lines 52-55.

Furthermore, since claims 2-4, 6-8, and 10-14 depend from claims 1, 5, and 9, respectively, these claims are allowable for at least the same reasons as those provided with respect to their respective independent, base claims. These dependent claims each may contain additional patentable subject matter.

CONCLUSION

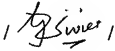
Applicants respectfully submit that the claims are in condition for allowance, and notification to that effect is earnestly requested. The Examiner is invited to telephone the undersigned at (408) 278-4057 to facilitate prosecution of this application.

If necessary, please charge any additional fees or deficiencies, or credit any overpayments to Deposit Account No. 19-0743.

Respectfully submitted,

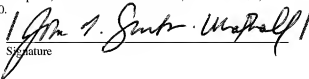
SCHWEGMAN, LUNDBERG & WOESSNER, P.A.
P.O. Box 2938
Minneapolis, MN 55402-0938
(408) 278-4041

Date 02.24.2010

By 
Garth Vivier
Reg. No. 57,313

CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being filed using the USPTO's electronic filing system EFS-Web, and is addressed to: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on this 24 day of February, 2010.

John D. Gustav-Wrathall
Name


Signature